89- 1463

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

MACKEL EARL EVANS AND
KENNETH WAYNE HINDS,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE FEDERAL SENTENCING GUIDELINES, AS INTERPRETED AND APPLIED IN THIS CASE, VIOLATED PETITIONERS' DUE PROCESS RIGHTS BY DEPRIVING THEM OF EFFECTIVE NOTICE OF THE CHARGES AND PENALTIES PENDING AGAINST THEM AND BY SUBJECTING PETITIONERS TO DEPRIVATIONS OF LIBERTY WITHOUT ADEQUATE PROCEDURAL PROTECTIONS.

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OPINION BELOW

The opinion of the Court of Appeals below (Appendix, p. A-1) is not reported. The opinion of the District Court below (Appendix, p. A-4) is not reported.

JURISDICTION

The judgment of the Court below (Appendix, p. A-1) was entered on December 14, 1989. Rehearing was not sought. The jurisdiction of this Court is invoked

under 28 U.S.C. §1254(1).

TIMELINESS OF FILING

Pursuant to amended Rule 20.1 of the Rules of the Supreme Court of the United States, effective January 1, 1990, this Petition is being brought within ninety (90) days of the entry of judgment rendered by the United States Court of Appeals for the Eighth Circuit on December 14, 1989.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners, Mackel Earl Evans and Kenneth Wayne Hinds, respectfully pray that a Writ of Certiorari issue and that this Court review the judgment and decision of the United States Court of Appeals for the Eighth Circuit entered on the 14th day of December, 1989, which opinion affirmed Petitioners' sentence to 235 months' imprisonment under the Federal Sentencing Guidelines for violation of 21 U.S.C. §841.

The constitutional provisions involved in this case are the Fifth Amendment, which provides that "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law," and the Sixth Amendment, which provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The statute under which Petitioners were prosecuted was 21 U.S.C. §841, which provides:

> (a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
> >
> > (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

The Guidelines under which Petitioners were sentenced include Sections 1B1.2, 1B1.3, 2D1.1, 2D1.4 and 6A1.3, the text of which provisions is set forth *verbatim* at pages A-9 through A-11 of the Appendix.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised on review can be briefly stated.

A. Course of Proceedings

On August 25, 1988, federal officers arrested Mackel Earl Evans and Kenneth Wayne Hinds while

they were in the act of synthesizing methamphetamine. At that time, Petitioners had succeeded in distilling a scant two (2) ounces of the drug in question.

The Grand Jury indicted Evans and Hinds on November 16, 1988, charging them with (i) interstate travel to manufacture methamphetamine, (ii) manufacture of phenylacetone, (iii) manufacture of methamphetamine, and (iv) illegal possession of a firearm, which charges constitute the basis of the trial court's jurisdiction below.

On January 14, 1989, Evans and Hinds pleaded guilty to manufacturing methamphetamine, the Government having previously dismissed the other three counts. Thereafter, on March 17, 1989, the United States District Court for the Western District of Arkansas, the Honorable H. Franklin Waters, held a sentencing hearing and ordered Evans and Hinds imprisoned for a term of almost twenty (20) years for the attempted manufacture of fifty (50) pounds of methamphetamine, instead of the actual manufacture of two (2) ounces.

Petitioners subsequently filed a Motion to Reconsider with the trial court, which Motion was denied on April 24, 1989. Accordingly, Evans and Hinds brought an appeal to the United States Court of Appeals for the Eighth Circuit. The appellate court denied Petitioners' appeal on December 14, 1989.

B. Facts Relevant to the Question Presented

Law enforcement officers began observing Evans and Hinds in mid-August of 1988, when the Petitioners ordered a quantity of chemicals, supplies, and glassware from a Houston, Texas, chemical supply house. The chemicals ordered were those commonly used in the synthesis of a controlled stimulant, methamphetamine.

Surveillance officers tailed the individual who actually purchased the supplies, and followed him from Houston to the state line, where the officers lost them. Law enforcement personnel then posted agents to the address listed on the order form given to them by the supplier, and observed the Petitioners, Evans and Hinds, going in and out of a garage-type building near Highway 62 in Springdale, Arkansas.

Surveillance of the Petitioners was maintained for over a week, and toward the end of that period, officers detected an odor characteristic of that associated with the synthesis of methamphetamine. Armed with the foregoing information, the officers sought and obtained a search warrant, which they executed on August 25, 1988. The search disclosed that Evans and Hinds possessed a quantity of chemicals, supplies, and glassware, including one hundred (100) pounds of phenylacetic acid. In addition, the officers

found that, during the previous week, Petitioners had succeeded in synthesizing less than seventy (70) grams of the drug in question.

The Grand Jury originally indicted Evans and Hinds on four counts relating to the manufacture of methamphetamine. (See page 4, *supra.*) However, in mid-January of 1989, the Government agreed to drop the interstate travel count, the manufacture of phenylacetone count, and the firearm count. Thereafter, Petitioners pleaded guilty to the single count charging them with the manufacture of methamphetamine under 18 U.S.C. §841.

With regard thereto, the District Court expressly determined that the count to which Evans and Hinds pleaded guilty accurately reflected the offense conduct involved. (R. Plea Hearing, p. 11) Indeed, any contrary determination would have permitted Petitioners to withdraw their plea. The District Judge questioned Petitioners on this point, and determined that they were pleading guilty to manufacturing the two ounces of methamphetamine found in liquid form at the scene of the search. (R. Plea Hearing, pp. 15-16.)

Over the next six weeks, the Probation Office compiled a Pre-Sentence Report, which was subsequently circulated among the parties. Thereafter, Evans and Hinds filed timely objections to the report, contesting statements contained therein which indicated that

Petitioners had possessed sufficient quantities of the requisite chemicals to synthesize some fifty (50) pounds of methamphetamine (even though only two ounces were actually produced). This challenged conclusion, in the view of the Probation Officer, mandated a sentence of from two hundred and thirty-five to two hundred and ninety-three (235-293) months' imprisonment. (R. Pre-Sentence Report, p. 8, para. 66.) Because the statute called for a maximum two hundred and forty (240) month term, the permissible range of incarceration was, therefore, considered to be from two hundred and thirty-five to two hundred and forty (235-240) months.

Petitioners' objections to the Pre-Sentence Report were fourfold:

1. The fifty (50) pound capacity estimate was based on the amount of phenylacetic acid found in the garage; yet phenylacetic acid is merely one of three indispensable components in the synthesizing of methamphetamine. To determine the actual capacity of the laboratory, one would have to accurately measure the amounts of other necessary constituent chemicals on hand.

2. Petitioners had ordered and intended to buy only twenty (20) pounds of phenylacetic acid, but were given an additional

ninety (90) pounds by the vendor; so there existed no intent to possess the excess nor manufacture the greater amount of methamphetamine.

3. Petitioners were personally incapable of performing the chemical synthesizing opeations efficiently and, as a result, consumed ten (10) pounds of phenylacetic acid in the production of the two ounces of methamphetamine involved in this case.

4. The fifty (50) pound estimate by the Government was based upon a different "recipe" than that to which the Petitioners had access. Moreover, even assuming that Petitioners' "recipe" would process one hundred and ten (110) pounds of phenylacetic acid, Evans and Hinds themselves could have only produced a maximum of sixteen (16) pounds from it. Furthermore, less than three pounds could have been produced from the materials at hand, and intended to be at hand (*i.e.*, the original twenty [20] pounds of phenylacetic acid).

The District Court invited the Government to put on evidence at the Sentencing hearing, and the

District Attorney called D.E.A. Agent Robert Havens, who related that a chemist employed by the State of Arkansas had told him that there was enough phenylacetic acid on hand (100 pounds at the time of the search) to produce fifty (50) pounds of methamphetamine. Havens, however, is not a chemist, and could not elucidate the topic, however, he readily conceded that one had to use other chemicals in combination with phenylacetic acid in order to produce methamphetamine. On this important point, the witness was unable to state how much of the other requisite chemicals were actually on hand.

The trial court expressly found as a matter of fact that Evans and Hinds had not intended to possess and process one hundred and ten (110) pounds of phenylacetic acid when they placed their order in Houston. Notwithstanding this fact, however, the sentencing Judge held that Petitioners had accepted the enlarged quantity and were, therefore, "involved with enough chemicals to make fifty (50) pounds" of methamphetamine. Based on this holding, the Court determined that the applicable Guideline range for the crime of manufacturing methamphetamine was level 34, indicating a manufacture of from 15 to 49.9 kilograms of cocaine or Schedule II Stimulant equivalents. To this level, the Court added two levels for "more than minimal planning," and two levels for possession of a firearm, and sentenced Petitioners to two hundred and thirty-five (235) months' imprisonment.

Petitioners appealed the District Court's judgment and sentence to the Eighth Circuit Court of Appeals, on the grounds that the sentencing Court's interpretation and application of the Federal Sentencing Guidelines was in error, under the particular facts and circumstances of this case.

The Appellate Court affirmed the District Court's decision on December 14, 1989, and it is from this affirmance that Petitioners now seek to appeal under 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT

1. THE FEDERAL SENTENCING GUIDELINES AS INTERPRETED AND APPLIED IN THIS CASE, AND CASES SIMILAR TO IT, VIOLATE DUE PROCESS BY DEPRIVING CRIMINAL DEFENDANTS OF EFFECTIVE NOTICE OF PENDING CHARGES AND PENALTIES, THEREBY SUBJECTING THOSE DEFENDANTS TO SEVERE DEPRIVATIONS OF LIBERTY WITHOUT NECESSARY PROCEDURAL PROTECTIONS.

It is a staple of due process that one may not be deprived of liberty without being given effective notice of the charges against him. *United States v. Crookshank*, 92 U.S. 542, 544 (1876); *Rosan v. United*

States, 161 U.S. 29, 40 (1896). Accordingly, an indictment must fairly inform a defendant of that with which he is charged, so that he can make his defense upon it. *Burton v. United States*, 202 U.S. 344 (1906). One may not be punished for a crime not charged in the indictment, or included within it. *Id.*

Further, once effective notice is given, the procedures to be employed must take their soundings from the gravity of the penalty to be imposed. Thus, "[i]n all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case." *Ex parte Wall*, 107 U.S. 265, 289 (1883). *See also, Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 163 (1951) (Justice Frankfurter, concurring).

In the case below, Petitioners were charged and pleaded guilty to manufacture of methamphetamine. The proof established that they had processed approximately two (2) ounces of the illegal drug. Under settled law, their plea establishes guilt of the crime of manufacture, and all crimes legally included within the completed offense.

The District Court and the Court of Appeals interpreted and applied the Federal Sentencing Guidelines as authorizing a finding that Petitioners had intended to manufacture fifty (50) pounds of the drug, and sentenced Petitioners on this aggravated basis. It is generally held, however, that facts constituting such

aggravation of a crime as will increase the punishment must be plainly charged, or those facts are not confessed by a plea. *Meyers v. United States*, 116 F.2d 601 (5th Cir. 1953).

Petitioners were not charged and did not plead guilty to attempting to manufacture fifty (50) pounds of methamphetamine. Further, an attempt to manufacture fifty (50) pounds is not an included offense of the charge of manufacturing a lesser quantity. More importantly, at no time during the proceedings below were the Petitioners informed on the record that their guilty plea would expose them to the almost 20-year prison term which they ultimately received. For these reasons, Petitioners should not have been sentenced to an enhanced term of imprisonment for the attempted manufacture of an exaggerated amount of the substance in question.

A. Substantial Future Liberty Interests Are Unlawfully Infringed When a Person Is Sentenced Under the Guidelines for an Attempt to Manufacture Fifty (50) Pounds of Methamphetamine, Where that Person Has Admitted to Processing Only Two (2) Ounces of the Prohibited Substance.

A legitimate expectation of a future release from confinement is a liberty interest protected by the Fifth Amendment, where an inmate's release date is set

back. *See, Wolff v. McDonnell,* 418 U.S. 639 (1974). Indeed, the Second Circuit has held that the Federal Sentencing Guidelines create liberty interests where none existed before. *United States v. Romano,* 890 F.2d 1284 (2d Cir. 1989).

Whereas formerly one who violated 21 U.S.C. §841 by manufacturing methamphetamine had no legitimate and protectible expectation of any sentence short of the plenary twenty (20) year term set forth in the statute, now one who manufactures quantities as small as two (2) ounces can expect a sentence of from thirty-two to forty (32-40) months. Any departure under or beyond that range must be justified by specific findings. United States Sentencing Commission, *Guidelines Manual,* §5K2.0 (November 1989).

In pleading guilty to manufacturing methamphetamine, Petitioners had a reasonable expectation of being sentenced to from twenty-one to twenty-seven (21-27) months for a level 16 offense. United States Sentencing Commission, *Guidelines Manual,* §2D1.1. Under the Guidelines, adjustments in sentencing may be made for "more than minimal planning" and firearms possession, if found by the District Court, as in this case. Such adjustments stood to increase Petitioners' sentence to a range of from thirty-three to forty-one (33-41) months. Thus, at the time they entered their plea, Petitioners had a legitimate expectation of future release from confinement in at

most forty-one (41) months.

The imposition by the District Court of a sentence of two hundred and thirty-five (235) months' imprisonment obviously implicates a very serious deprivation of Petitioners' liberty. Accordingly, Petitioners urge that a writ of certiorari issue in this case, since they had no effective notice of the extent to which their future liberty would be deprived. As a direct result, Petitioners faced the loss of significant liberty within a context bereft of procedural protections. For this reason, Petitioners' due process rights were violated below.

B. The Due Process Clause Does Not Permit a Sentencing Court to Invade Protected Liberty Interests by Finding that a Defendant Has Committed Separate and Aggravated Crimes Beyond Those Charged by the Indictment.

On January 14, 1989, Mackel Earl Evans and Kenneth Wayne Hinds pleaded guilty to manufacturing methamphetamine, the quantity seized being around seventy (70) grams. Petitioners were sentenced, however, for attempting to synthesize a much larger amount. Specifically, the trial court based Petitioners' 235-month sentence on the court's assessment that Evans and Hinds had *attempted* to manufacture fifty (50) pounds of the substance in question. This conclusion, however, was

premised upon a finding which required the determination of a fact which was not an element of the offense charged. It is this improper finding of fact which entitles Petitioners to a reversal of the judgment and sentence rendered herein.

Specifically, *Specht v. Patterson*, 386 U.S. 605, 609-10 (1967), held that, when such a situation is presented, a criminal defendant is entitled to a "full judicial hearing" before a magnified sentence may be imposed by the trial court. At such a hearing, the demands of due process cannot be satisfied by partial or niggardly procedural protections; rather, the defendant is entitled to the full panoply of due process protection, including confrontation. *Id.*

The District Court interpreted and applied the Sentencing Guidelines in a fashion which permitted the trial Judge to stray beyond the parameter established by the indictment, and to find, as a fact, that Petitioners were guilty of a magnitude of crime four hundred times greater than the one to which they confessed. Moreover, this crucial finding was made within a procedural context which denied Petitioners notice of the specific accusation, made against them, and denied Petitioners the ability to confront their accusers.

More importantly, Evans and Hinds were denied the right to have the critical element of their intent—traditionally determined by a jury charged with

the duty of resolving all reasonable doubts favorably to the accused—judged by competent evidence. As far as it appears, the trial court believed that the Sentencing Guidelines required the trial judge to aggravate the Petitioners' offense[1] and, therefore, their punishment on findings established by as little as a preponderance of rank, hearsay evidence.

Specht v. Patterson, 386 U.S. 605 (1967), controls the extent to which a trial court may depart from the indictment in assessing a punishment. To the extent that an enhanced punishment isbased upon a required factual finding extraneous to that made when a plea was taken, or a verdict returned, the sentencing court must hold a plenary hearing, and permit the accused an opportunity to fully confront his accusers.

In *Specht v. Patterson*, 386 U.S. 605 (1967), the defendant was an individual convicted of indecent liberties under Colorado Rev. Stats. §40-2-32. Specht was sentenced, however, under Colorado Rev. Stats. §39-19-1 as being a sex offender. The Colorado statutory scheme made a conviction under §40-2-32 the basis for commencing a proceeding under §39-19-1, which provided for indeterminate sentences for parties who were deemed to present a threat of harm to the public.

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[1]To this end the District Court stated: "The facts [sic] contained and set forth in that pre-sentence report have a great deal to do, in fact, almost a complete dictation of what the Court does in relation to the sentence to be imposed." (R. Sentence Hearing, p. 3.)

"Public dangerousness" was a new finding of fact not otherwise an element of the offense of which Specht stood convicted; so this defendant was deemed entitled to a "full judicial hearing." *Id.* at 609.

In the present case, Evans and Hinds stood convicted of manufacturing methamphetamine, appearing to have synthesized just under seventy (70) grams of it. The cocaine equivalency table states that one gram of methamphetamine equals .833 gram of cocaine; so the cocaine equivalent of what Petitioners manufactured was 59 grams, which is a level 16 offense under the Guidelines. This level, with adjustments for firearm possession and an organizing role, would yield a sentence of from thirty-three to forty-one (33-41) months, which is at least 194 months less than the term to which Evans and Hinds were sentenced.

C. The Trial Court's Erroneous Application of the Federal Sentencing Guidelines Deprived Petitioners of Their Sixth Amendment Rights of Confrontation.

The Probation Officer's Pre-Sentence Reported stated that, during the search of the outbuilding in question, enough chemicals were taken to produce approximately fifty (50) pounds (22.2 kilograms) of methamphetamine. (R. Pre-Sentence Report, p. 4, para. 25.) On this point, the District Court expressly found that Evans and Hinds had ordered and intended

to purchase only twenty (20) pounds of phenylacetic acid, and that Petitioners had been given an additional ninety (90) pounds by the chemical supply company in Houston. (R. Sentencing Hearing, pp. 5-8.)

Robert Havens, the D.E.A. agent involved with the investigation, testified that the fifty (50) pound capacity estimate was based *solely* on the amount of phenylacetic acid found on the premises at the time of the search. (R. Sentencing Hearing, p. 15.) However, phenylacetic acid is but one requisite component in the synthesis of phenyl-2-propanol, the immediate precursor of methamphetamine. Moreover, Agent Havens was given the fifty (50) pound estimate by a "state chemist" named Sullivan, who was on the scene of the search, but who was not in attendance at the sentencing hearing. (R. Sentencing Hearing, pp. 14-15).

Robert Havens is not a chemist (R. Sentencing Hearing, p. 16), and, in fact, any pretense he has to such a calling would be seriously impeached by his in-court testimony, wherein he took vigorous issue with the proposition that 573.8 milligrams constitutes less than an ounce. (R. Sentencing Hearing, p. 20.) Indeed, Havens swore that such a quantity was "quite a bit more than an ounce." *Id.* But he conceded, finally, that it was "less than several ounces." (R. Sentencing Hearing, p. 21.)

In fact, 573.8 milligrams is a little more than

In fact, 573.8 milligrams is a little more than nine-sixteenths (9/16) of a gram, and the Court may take judicial notice that there are 28.35 grams in an ounce. In truth, then, 573.8 milligrams is about one-fiftieth (1/50) of an ounce, a fact which even a high school chemistry student would be expected to know within one week.

Agent Havens told the District Court that to process methamphetamine, one combines phenylacetic acid, sodium acetate, and acetic anhydride. (R. Sentencing Hearing, p. 18.) Agent Havens testified that he did not know how much sodium acetate was on the premises when it was searched. (R. Sentencing Hearing, pp. 18-19.) Likewise, this agent testified that he did not know how much acetic anhydride was there. (R. Sentencing Hearing, pp. 18-19.) Agent Havens admitted, however, that, if a person had a thousand pounds of phenylacetic acid, he would be unable to "cook" even a microgram of methamphetamine, without the requisite amounts of sodium acetate and acetic anhydride. *Id.* The quantity which one could create would be wholly dependent on how much sodium acetate and acetic anhydride were on hand.

The trial court's factual finding, then, was based on the uninformed recollection of a D.E.A. Agent, who exhibited an obvious ignorance of chemistry, about what an absent expert witness had previously told him. In further evidence of the lower court's improper assessment of the case at bar, the Probation Officer

expressly stated in the Pre-Sentence Report that he had "accepted information" relayed to him by the Government, rather than conducting an independent investigation into Petitioners' case. (R. Sentencing Hearing, p. 1, para. 1.) And to further compound the error raised by Petitioners herein, the trial court, in opening the sentencing hearing, announced that the "facts" contained in the Pre-Sentence Report essentially dictated the sentence to be imposed. (R. Sentencing Hearing, p. 3.)

The District Court deprived Petitioners of sixteen years' liberty under the assumption that such a sentence was required by the Federal Sentencing Guidelines. If that be true, then the Guidelines authorize findings and penalties disallowed by the United States Supreme Court in *Specht v. Patterson*, *supra*, in the absence of significant procedural protections. This Court should grant certiorari in Petitioners' case to stop what will amount to a massive invasion of personal liberties to be repeated on a daily basis in the federal criminal courts. If the Guidelines do not in fact authorize such procedures and penalties, the writ should issue to end a confusion which has already claimed the concurrence of at least one federal court of appeals.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for Writ of Certiorari be granted and that the Supreme Court consider and rule upon the issues raised by this appeal.

Respectfully submitted,

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Counsel of Record

Appendix

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 89-1758

United States of America,
Appellee,

v.

Mackel Earl Evans,
Kenneth Wayne Hinds,
Appellants.

Appeal from the United States District Court for the Western District of Arkansas.
Submitted: October 13, 1989
Filed: December 14, 1989
Before FAGG, Circuit Judge, HENLEY, Senior Circuit Judge, and BEAM, Circuit Judge.
FAGG, Circuit Judge.

Mackel Earl Evans and Kenneth Wayne Hinds appeal their sentences for manufacturing methamphetamine in violation of 21 U.S.C. §841(a)(1) (1982). Evans and Hinds contend the district court committed error in arriving at their base offense level by using an approximation of the amount of methamphetamine they were capable of producing with the chemicals seized from their drug laboratory. *See* U.S.S.G §2D1.1(a)(3) (Oct. 1987). We affirm.

Evans and Hinds argue the drug quantity

relevant to their sentences for manufacturing is only the .0688 kilogram of methamphetamine they produced before their arrest. We disagree. The offense level for the manufacture of a controlled substance is determined by the quantity of the substance involved. *Id.* If the amount of drugs seized does not reflect the scale of the manufacturing offense, the sentence must approximate the quantity of controlled substance that could have been produced by the laboratory involved in the offense. *Id.* §2D1.1 commentary, application note 11 (Jan. 1988) (incorporating application note 2 of the commentary to section 2D1.4 [Oct. 1988]). Thus, the guidelines did not limit the district court's consideration to the .0688 kilogram of methamphetamine Evans and Hinds actually produced. We conclude the district court correctly considered evidence that Evans and Hinds were capable of producing approximately 22.5 kilograms of methamphetamine with the seized chemicals in determining their offense level.

Evans and Hinds also contend they were denied due process because the district court based its approximation of their manufacturing capability on the estimate of á state chemist contained in the presentence report when the chemist himself did not testify at the sentencing hearing. This argument lacks merit. Uncorroborated hearsay evidence contained in a presentence report may be considered by the sentencer provided the persons sentenced are given an opportunity to explain or rebut the evidence. *United States v. York*,

830 F.2d 885, 893 (8th Cir. 1987) (per curiam), *cert. denied*, 108 S.Ct. 1047 (1988). The sentencing transcript shows Evans and Hinds were given that opportunity and offered no disputing evidence. Further, the chemist's estimate was corroborated by the testimony of an experienced drug enforcement agent. The chemist's estimate was properly considered by the district court.

Having carefully considered Evans's and Hinds's arguments, we affirm their sentences.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE

United States of America
v.
Mackel Earl Evans

Judgment Including Sentence Under the Sentencing Reform Act

Case Number 88-50015-01

E. E. Maglothin, Defendant's Attorney

The Defendant pleaded guilty to count(s) Three of the Indictment.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 U.S.C. 841(a)(1)	Knowingly and Intentionally Manufacturing methamphetamine, a Schedule II Controlled Substance	Three

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is

imposed pursuant to the Sentencing Reform Act of 1984.

Counts One, Two and Four of Indictment are dismissed on the motion of the United States.

It is ordered that the defendant shall pay to the United States a special assessment of $50, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number: 431-94-6068
Defendant's Mailing Address: Route 2, Springdale, AR 72764
Defendant's residence address: Route 2 (Currently Washington County Jail), Springdale AR 72764.
Date of Imposition of Sentence: March 17, 1989
Name & Title of Judicial Officer: Hon. F. Franklin Waters, Chief U. S. District Judge
Date: March 17, 1989

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 235 months.

The defendant is remanded to the custody of the United States Marshal.

STATEMENT OF REASONS FOR IMPOSITION OF SENTENCE

18 U.S.C. 3553(c)(1). The defendant was involved with enough chemicals to have produced 50 pounds of methamphetamine. This amount places the guideline range well above the maximum statute by law. The defendant's lack of acceptance of responsibility as demonstrated in his efforts to set up a second methamphetamine lab while on bond further supports the sentence of 235 months.

H. FRANKLIN WATERS
Chief U. S. District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE

United States of America
v.
Kenneth Wayne Hinds

Judgment Including Sentence Under the Sentencing Reform Act

Case Number 88-50015-02

E. Kent Hirsch, Defendant's Attorney

The Defendant pleaded guilty to count(s) Three of the Indictment.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 U.S.C. 841(a)(1)	Knowingly and Intentionally Manufacturing methamphetamine, a Schedule II Controlled Substance	Three

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Counts One, Two and Four of Indictment are dismissed on the motion of the United States.

It is ordered that the defendant shall pay to the United States a special assessment of $50, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number: 431-80-6691
Defendant's Mailing Address: Route 4, Box 474, Springdale, AR 72764
Defendant's residence address: Route 4, Box 474 (Currently Washington County Jail), Springdale AR 72764.
Date of Imposition of Sentence: March 17, 1989
Name & Title of Judicial Officer: Hon. F. Franklin Waters, Chief U. S. District Judge
Date: March 17, 1989

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 235 months.

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STATEMENT OF REASONS
FOR IMPOSITION OF SENTENCE

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H. FRANKLIN WATERS
Chief U. S. District Judge

Section 1B1.2. **Applicable Guidelines**

(a) Determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). *Provided*, however, in the case of conviction by a plea of guilty or *nolo contendere* containing by a stipulation that specifically established a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

(b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with section 1B1.3 (Relevant Conduct).

(c) A conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).

(d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as

if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Section 1B1.3. **Relevant Conduct (Factors that Determine the Guideline Range)**

(a) **Chapters Two (Offense Conduct) and Three (Adjustments).** Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which section 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of

conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and

(4) any other information specified in the applicable guidelines.

(b) **Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).** Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Section 2D1.1.**Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses)**

(a) Base Offense Level (Apply the greatest):

(1)43, if the defendant is convicted under 21 U.S.C. §841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. §960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant

committed the offense after one or more prior convictions for a similar offense; or

(2)38, if the defendant is convicted under 21 U.S.C. §841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. §960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3)the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1)If a dangerous weapon (including a firearm) was possessed during commission of the offense, increase by 2 levels.

(2)If the defendant is convicted of violating 21 U.S.C. §960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

Section 2D1.4 **Attempts and Conspiracies.**

(a) Base Offense Level: If a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy had been completed.

Section 5K2.0. **Grounds for Departure** (Policy Statement)

Under 18 U.S.C. §3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate

consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (*e.g.*, as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where the applicable guidelines, specific offense characteristics and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction. Thus, disruption of a governmental function, section 5K2.7, would have to be quite serious to warrant departure from the guidelines when the offense of the conviction is bribery or obstruction of justice. When the offense of conviction is theft, however, and when the theft caused disruption of a governmental function, departure from the applicable guideline more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the offense of conviction is robbery because the robbery guideline includes a specific sentence adjustment based on the extent of any injury. However, because the robbery guideline

does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in section 1B1.3.

Section 6A1.3. **Resolution of Disputed Factors** (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information

without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve undisputed sentencing factors in accordance with Rules 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.